

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 23, 2007

PHILLIP O'BRIAN PYE v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Maury County
No. 14623 Stella Hargrove, Judge**

No. M2006-01504-CCA-R3-PC - Filed on June 20, 2007

Petitioner, Phillip O'Brian Pye, appeals the denial of his petition for post-conviction relief. On appeal, Petitioner contends that (1) trial counsel provided ineffective assistance of counsel during the negotiation and entry of his pleas of guilty; and (2) his guilty pleas were not voluntarily or knowingly entered into because he was under the influence of a drug and because his counsel rendered ineffective assistance of counsel. After a thorough review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Ryan D. Brown, Columbia, Tennessee, for the appellant, Phillip O'Brian Pye.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Dan Runde, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Petitioner was indicted on three counts of attempted first degree murder, a Class A felony; one count of vandalism, a Class D felony; and three counts of aggravated assault, a Class C felony. Prior to trial, Petitioner entered into a negotiated plea agreement where Petitioner agreed to enter a plea of guilty to three counts of aggravated assault, one count of vandalism, and two counts of reckless endangerment, with the trial court to determine the length and manner of service of the sentence for each conviction. In exchange, the State entered a nolle prosequi as to the three counts of attempted first degree murder and the three counts of aggravated assault reflected in the indictment. Due to the parties' uncertainty at the time regarding the lesser-included offenses of

attempted first degree murder, the State prepared a criminal information for the aggravated assault and reckless endangerment offenses. Petitioner executed a written waiver to proceed by criminal information on the charged offenses.

A lengthy guilty plea submission hearing was held on December 14, 2004, during which the trial court methodically questioned Petitioner as required by Rule 11 of the Tennessee Rules of Criminal Procedure. Petitioner acknowledged that he had not consumed any alcohol or drugs prior to the hearing. Petitioner affirmatively confirmed that by entering his plea he was waiving his constitutional right to a trial by jury and appellate review of his convictions. Petitioner agreed that his pleas of guilty were not the result of coercion or force. The trial court explained in detail the consequences of proceeding by criminal information, and Petitioner indicated that he understood and had no questions about the procedure. Petitioner stated that he did not wish to proceed to trial and was satisfied with the plea agreement and the assistance of his trial counsel.

Petitioner acknowledged that he had discussed the case with his trial counsel, including what the State would have to prove to support each charged offense. The trial court repeatedly informed Petitioner that the negotiated plea agreement provided that the trial court would determine the length and manner of service of Petitioner's sentences for his convictions. At one point, the following discussion occurred:

[TRIAL COURT]: Vandalism in your range carries one to two years in the penitentiary. The aggravated assault carries three to six years on each of these three counts. And the reckless endangerment carries one to two years. Do you understand that?

[PETITIONER]: Yes, ma'am.

[TRIAL COURT]: And this Judge could sentence you to the maximum and run everything on top of each other. Do you understand that?

[PETITIONER]: Yes, ma'am.

[TRIAL COURT]: For instance, you could be sentenced under just the aggravated assaults to 18 years. Do you understand that?

[PETITIONER]: Yes, ma'am.

...

[TRIAL COURT]: And you understand that's . . . for the Judge to decide at sentencing?

[PETITIONER]: Yes, ma'am.

. . .

[TRIAL COURT]: I don't want you coming back up here and saying, "Well, you know, I didn't understand that. I didn't understand that this Judge could give me all these years." So now is the time to ask the questions. Do you have any?

([Petitioner] confers with counsel.)

[DEFENSE COUNSEL] That all gets decided on January the 20th. We'll present evidence.

. . .

[TRIAL COURT]: Any questions?

[PETITIONER]: No, ma'am.

[TRIAL COURT]: Do you still want me to accept your plea?

[PETITIONER]: Yes, ma'am.

The State presented the following statement of facts in support of the charged offenses. Lastacha Patrick, Petitioner's girlfriend, went to Petitioner's house on the morning of the incident. Their conversation turned into an argument. Ashley Frierson and Donyell Graham arrived at Petitioner's house and left with Ms. Patrick. Later that afternoon, the three women were riding in Ms. Patrick's green Ford Mustang. One of the women received a cell phone call from Petitioner who made certain threats. Petitioner, who was in his vehicle, spotted the green Mustang near the Rosehill Cemetery. Petitioner turned around and pursued the women through town. When Ms. Patrick stopped at an intersection, Petitioner rammed his vehicle into the Mustang from the rear, and then continued to pursue the women. Petitioner's vehicle struck the Mustang a second time behind the post office. Ms. Patrick drove to a relative's house and pulled around back to hide from Petitioner. Petitioner spotted Ms. Patrick's vehicle and pulled into the residence's driveway. Petitioner parked, opened his trunk, and retrieved an Intertec 9-millimeter semi-automatic weapon. Petitioner fired repeatedly in the direction of the Mustang.

Detective Mickey Jones, with the Columbia Police Department, was in the area serving a warrant in an unrelated matter and observed Petitioner retrieve his gun from the trunk of his car and fire the weapon in the direction of the Mustang. She radioed for assistance, and Petitioner was apprehended a short distance from the house. The semi-automatic weapon was retrieved from Petitioner's vehicle.

The trial court accepted Petitioner's pleas of guilty to the charged offenses in accordance with the negotiated plea agreement. On December 16, 2004, Petitioner wrote to the trial court requesting that he be allowed to withdraw his pleas of guilty. Petitioner stated that he was innocent of the charges and maintained that he was under the influence of Seroquel when he entered his pleas of guilty. The trial court deemed Petitioner's letter to be a motion to withdraw guilty pleas, and a hearing on the motion was held on March 22, 2005. At the conclusion of the hearing, the trial court denied Petitioner's motion, finding, in part, as follows:

And observing the demeanor of [Petitioner] on [December 14, 2004], the Court was satisfied that he understood what was being said; what was being done. He was asked specifically about was he taking any medication. He says, no. . . . He was asked several times about taking a break, letting him talk with his lawyer, wanting to make sure he didn't . . . want a trial, and that he wanted the Court to accept this open plea with a sentencing hearing. He says, yes, many times. . . . And the Court finds that these pleas were entered freely, voluntarily, intelligently, and knowingly, upon advice of counsel, with a clear mind

There is no indication in the record that Petitioner appealed the trial court's denial of his motion to withdraw his pleas of guilty. Following a sentencing hearing on May 27, 2005, the trial court sentenced Petitioner to an effective sentence of twelve years as a Range I standard offender for the charged offenses.

II. Post-Conviction Hearing

Petitioner's trial counsel testified that he had been in practice for twenty-four years and was retained by Petitioner to represent him on the current charges prior to the preliminary hearing. Trial counsel first met with Petitioner at the Maury County Jail where Petitioner was incarcerated. Trial counsel recollected that he and Petitioner subsequently met four or five times between the preliminary hearing and the entry of Petitioner's pleas of guilty. Petitioner's theory of defense was based on Petitioner's contention that he discharged his weapon into the air because he just wanted to frighten the victims, not hurt them. Trial counsel had no doubt that Petitioner wanted to proceed to trial after their first meeting.

Trial counsel recollected that Petitioner inquired about hiring an investigator, but trial counsel did not believe that was necessary. There were no eyewitnesses to the offenses other than the victims and Detective Mason. Trial counsel said that Petitioner told him that he had lunch with Ms. Patrick while he was out on bond, and Ms. Patrick was not angry with him over the incident. Trial counsel

believed that information might be relevant at the sentencing phase of the trial. Trial counsel recollected that Petitioner asked for copies of the State's discovery, and he and Petitioner reviewed trial counsel's files during one of their meetings. Trial counsel did not recollect whether he made copies of the State's discovery for Petitioner.

Trial counsel relayed to Petitioner at the jail the State's offer to reduce the attempted first degree murder charges to aggravated assault the day before the guilty plea submission hearing. Trial counsel and Petitioner met for approximately one hour on the morning of the hearing, and trial counsel explained the negotiated plea agreement and the procedure for proceeding on a criminal information rather than an indictment. Trial counsel believed that a conviction of aggravated assault was the best to hope for if the case were submitted to a jury, and Petitioner "thought long and hard about his decision." Trial counsel said that Petitioner did not disclose that he had taken any drugs the morning of the guilty plea submission hearing. Petitioner did not have any apparent difficulty understanding the details and consequences of his pleas and showed no physical effects of any drugs.

Trial counsel said that he denied telling Petitioner that the trial court would sentence him to three years for the aggravated assault convictions, but trial counsel did express to Petitioner his hope that the trial court would not impose consecutive sentencing.

On cross-examination, trial counsel conceded that some of the State's evidence contradicted Petitioner's defense that he discharged his weapon into the air to frighten the victims. Detective Mason was prepared to testify that Petitioner held his gun at waist level and parallel to the ground as he fired. The eight shell casings found at the scene were scattered over the yard and not clumped together in one location. A bullet was retrieved from beneath the edge of a dog house's roof, at an elevation approximately level with Petitioner's waist. Trial counsel conceded that one could interpret the State's evidence to conclude that Petitioner was shooting as he walked toward the victims. Trial counsel reiterated that he did not believe that there were any witnesses who could be called on Petitioner's behalf.

Petitioner testified on his own behalf. Petitioner stated that he hired trial counsel prior to the preliminary hearing. Trial counsel met with Petitioner at the jail, explained the charges against him, and told him what the State would have to prove to support the charges. Petitioner acknowledged that trial counsel accurately described on direct examination Petitioner's version of the sequence of events leading up to the charges.

Petitioner said he was released from jail on bond for six months, and he did not hear from trial counsel during this time. Petitioner tried to call trial counsel, but trial counsel would not return his calls. Petitioner asked trial counsel to hire an investigator, but trial counsel said it was not necessary. Petitioner believed an investigator could have "probably [found] a witness" who would testify that Petitioner did not intend to harm the victims. Petitioner said that he did not receive copies of the State's discovery and did not know who was scheduled to testify as a State's witness.

Petitioner stated that the only reason he agreed to plead guilty was because trial counsel guaranteed that he would be sentenced for an effective sentence of three years. Petitioner denied that trial counsel explained the details of the plea agreement, including proceeding by criminal information. Petitioner denied that he met with trial counsel the day before he entered his plea of guilty, and then conceded that if trial counsel had met with him, it was just a “small meeting.”

Petitioner said that he did not remember the guilty plea submission hearing because he was under the influence of Seroquel which Petitioner had received from an inmate earlier that morning. Petitioner insisted that he did not know he was pleading guilty to aggravated assault. Petitioner believed that he was pleading guilty to reckless endangerment with a corresponding sentence of three years. Petitioner said that he responded affirmatively to the trial court’s questions during the guilty plea submission hearing because he “wasn’t in [his] right frame of mind at the time” because of the medication, and because of his “[l]ack of knowledge to the subject area matter.”

On cross-examination, Petitioner said that the only thing he remembered about the guilty plea submission hearing was that he was going to be sentenced for an effective sentence of three years. Petitioner acknowledged that his letter to the trial court stated that he wished to withdraw his guilty plea because he was innocent of the charged offenses, but he insisted at the post-conviction hearing that the main reason he sought to withdraw his plea was his discovery the next day that he had pled guilty to aggravated assault instead of reckless endangerment.

III. Standard of Review

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that the services rendered by trial counsel were deficient and that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must prove that counsel performed deficiently and, “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). “Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

This Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. *See id.* at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact ... thus, [appellate] review of [these issues] is *de novo* “ with no presumption of correctness. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *Adkins v. State*, 911 S.W.2d 334,

347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

IV. Voluntariness of Guilty Pleas - Ingestion of Seroquel

Relying on *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712 (1969), Petitioner argues that the post-conviction court erred in finding that his pleas of guilty to the charged offenses were voluntarily, knowingly, and intelligently entered into. The post-conviction procedure may not be used to re-litigate issues that have been “previously determined.” *See* T.C.A. § 40-30-106(f) (2003). A ground for relief is previously determined when “a court of competent jurisdiction has ruled on the merits after a full and fair hearing.” *Id.* § 40-30-106(h) (2003). “A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.” *Id.*; *see Miller v. State*, 54 S.W.3d 743, 747-48 (Tenn. 2001) (holding that issue raised and resolved in the petitioner’s direct appeal “cannot be revisited in this post-conviction proceeding”).

Petitioner sought to withdraw his pleas of guilty on one of the same grounds that he now seeks post-conviction relief. That is, Petitioner contended that the entry of his guilty pleas were not voluntarily entered into because he was under the influence of Seroquel at the time of the guilty plea submission hearing. Petitioner was granted a full hearing on his motion to withdraw at which he testified on his own behalf. At the conclusion of the lengthy hearing, the trial court found that Petitioner’s “pleas were entered freely, voluntarily, intelligently, and knowingly, upon advice of counsel, with a clear mind.” Accordingly, we conclude that this ground for relief is waived.

Moreover, Petitioner failed to present his issue on a direct appeal of the trial court’s denial of his motion to withdraw his guilty pleas. *See State v. Peele*, 58 S.W.3d 701, 706 (Tenn. 2001) (concluding that a defendant is entitled to appellate review of the trial court’s denial of a motion to withdraw his guilty plea). Because this issue could have been raised on direct appeal, we conclude that the issue is waived in this post-conviction proceeding pursuant to Tennessee Code Annotated section 40-30-106(g). Accordingly, we conclude that the Petitioner is not entitled to relief on this issue.

V. Ineffective Assistance of Counsel

To the extent, however, that Petitioner raises issues concerning the ineffective assistance of his trial counsel in connection with the negotiation and entry of his pleas of guilty, such issues may provide a ground for relief under the Post-Conviction Procedure Act. *See* T.C.A. § 40-30-103.

Petitioner argues that trial counsel’s assistance was deficient because he failed to sufficiently communicate with Petitioner concerning the charged offenses and failed to provide adequate advice

regarding the decision to enter into a negotiated plea agreement with the State. Specifically, Petitioner contends that trial counsel led him to believe that he would be sentenced to an effective sentence of three years.

Trial counsel testified that he met with Petitioner four or five times prior to the guilty plea submission hearing and explained the charges and evidence to Petitioner. Trial counsel stated that he did not see the necessity in hiring an investigator because no witnesses were present at the shooting other than the victims. Trial counsel testified that he explained the range of punishment for the charged offenses and did not tell Petitioner that he would only receive an effective sentence of three years. Trial counsel said that he hoped the trial court would order Petitioner to serve his sentences concurrently but that Petitioner understood that the negotiated plea agreement left the sentencing determinations to the trial court.

Petitioner did not present any witnesses having potentially exculpatory testimony at the post-conviction hearing. A petitioner should have such witnesses testify at the evidentiary hearing. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Thus, Petitioner has failed to show that he was prejudiced by trial counsel's failure to present witnesses on Petitioner's behalf.

As to the other allegations of deficient assistance, the post-conviction court implicitly found trial counsel's testimony credible, and found that "Petitioner had excellent representation by an experienced and very thorough and conscientious defense lawyer, who protected and safeguarded his rights at every stage."

Based on our review, we conclude that Petitioner has failed to show that his trial counsel's assistance was deficient in the negotiation and entry of his pleas of guilty to the charged offense. Accordingly, Petitioner is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE